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No. 85-1773

In The

Supreme Court of the United States

October Term, 1985

CHARLES OBERLY, III and JOHN E. WILSON, III

Appellants,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, et al,

Appellees.

ON APPEAL FROM U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT

APPELLEES' MOTION TO AFFIRM

DUANE, MORRIS & HECKSCHER
WILLIAM E. MANNING
ALICE W. BECK

1220 Market Building
Suite 7000
Wilmington, DE 19899
(302) 571-5556

Counsel for Appellees

DATED: May 28, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

QUESTION PRESENTED

Do regulations promulgated by the Environmental Protection Agency ("EPA") pursuant to the Noise Control Act of 1972, 42 U.S.C. § 4901 *et seq.* (1972) concerning railroad noise emission standards, preempt the enforcement of the State of Delaware's ("Delaware") regulations issued pursuant to its legislation where both the EPA's and Delaware's regulations regulate the level of noise emissions at railyards, but regulate them by different methods?

PARTIES TO PROCEEDINGS BELOW

For the information required by Supreme Court Rule 28.1, the Corporate Appellees refer the Court to Appellants' Appendix to Jurisdictional Statement pp. A-53 - A-54 ("Appellants' Appendix p. —").

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APPELLEES' MOTION TO AFFIRM

Pursuant to Rule 16.1, the Appellees move to affirm the judgment of the Court of Appeals for the Third Circuit on the grounds that the lower courts properly found that the federal regulations preempt the State of Delaware's regulations and the questions on which the decision of the cause depends are so insubstantial as not to need further argument.

SUMMARY OF ARGUMENT

This case involves a difference of opinion between federal and state regulators concerning how best to regulate noise from railroad equipment and facilities. This difference of opinion resulted in conflicting standards for such noise emissions. The District and Circuit Courts, applying well-settled preemption principles, properly found under these circumstances that Congress in enacting the Noise Control Act of 1972, 42 U.S.C. § 4916 *et seq.*, intended to preempt state and local regulations. Furthermore, contrary to Appellants' assertions, there is no disagreement among the several Circuits over the application of those principles.

STATUTORY PROVISIONS INVOLVED

This action involves the relationship between a federal statute, the Noise Control Act of 1972 ("the Act"), 42 U.S.C. § 4901 *et seq.* (1972), and regulations promulgated thereunder, and a Delaware statute, the Delaware Noise Control and Abatement Act, 7 *Del. C.*, Ch. 71, §§ 7102-7125 (1982) ("the Delaware Act"), and regulations promulgated thereunder. Relevant portions of the Act provide:

§ 4901. Congressional findings and statement of policy

(a) The Congress finds—

(1) that inadequately controlled noise presents a growing danger to the health and welfare of the Nation's population, particularly in urban areas;

(2) that the major sources of noise include transportation vehicles and equipment, machinery, appliances, and other products in commerce; and

(3) that, while primary responsibility for control of noise rests with State and local governments, Federal action is essential to deal with major noise sources in commerce control of which requires national uniformity of treatment.

(b) The Congress declares that it is the policy of the United States to promote an environment for all Americans free from noise that jeopardizes their health or welfare. To that end, it is the purpose of this chapter to establish a means for effective coordination of Federal research and activities in noise control, to authorize the establishment of Federal noise emission standards for products distributed in commerce, and to provide information to the public respecting the noise emission and noise reduction characteristics of such products.

§ 4916. Railroad noise emission standards

(a) Regulations; standards; consultation with Secretary of Transportation

(1) Within nine months after October 27, 1972, the Administrator shall publish proposed noise emission regulations for surface carriers engaged in interstate commerce by railroad. Such proposed regulations shall include noise emission standards setting such limits on noise emissions resulting from operation of the equipment and facilities of surface carriers engaged in interstate commerce by railroad which reflect the degree of noise reduction achievable through the application of the best available technology, taking into account the cost of compliance. These regulations shall be in addition to any regulations that may be proposed under section 4905 of this title.

• • •

(c) State and local standards and controls

(1) Subject to paragraph (2) but notwithstanding any other provision of this chapter, after the

> effective date of a regulation under this section applicable to noise emissions resulting from the operation of any equipment or facility of a surface carrier engaged in interstate commerce by railroad, no State or political subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.
>
> (2) Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on levels of environmental noise, or to control license, regulate, or restrict the use, operation, or movement of any product if the Administrator, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation, or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under this section.

The Delaware Act is found in Appellants' Appendix pp. A-25 - A-38.

STATEMENT OF FACTS

Appellees accept the portion of Appellants' factual summary entitled "The Chessie Group's Operation," Appellants' Jurisdictional Statement pp. 3-4 ("AJS p. —"). We also agree that a summary of the history of the competing federal and state regulations is important and helpful to the Court. Appellees disagree, however, with portions of Appellants' summary of relevant "Regu-

latory History," AJS pp. 4-7, and therefore, offer our own such summary.

The Act directs the EPA to regulate "noise emissions resulting from operation of the equipment and facilities of surface carriers engaged in interstate commerce by railroad." 42 U.S.C. § 4916(a) (1). The Act further provides that after the EPA promulgates regulations applicable to noise emissions resulting from the operation of railroad equipment and facilities, no state may adopt or enforce any different standard. 42 U.S.C. § 4916(c) (1). However, the Act invites a state with special local problems not addressed by the EPA regulations to apply to the EPA for permission to establish and enforce regulations dealing with the special problems. 42 U.S.C. § 4916(c) (2).

On July 3, 1974, the EPA issued a notice of proposed rulemaking in which the agency announced its intention to regulate noise emitted by rail cars and locomotives. It decided not to impose standards for other railroad equipment or facilities because it believed that noise from other equipment and facilities was best controlled by state and local regulation. However, the EPA stressed that if in the future it appeared that a different approach would be better, it would alter its regulations accordingly. 39 Fed. Reg. 24580 (1974).

Prior to promulgation of the final regulations, the Association of American Railroads ("AAR") instituted an action against the EPA, *AAR v. Costle*, 562 F.2d 1310 (1977), arguing that the Act required the EPA to regulate *all* equipment and facilities and not just rail cars and locomotives. The United States Court of Appeals for the Dis-

trict of Columbia agreed with the AAR and directed the EPA to promulgate regulations dealing with all railroad equipment and facilities. *Id.* at 1322.

Pursuant to the court order, the EPA issued a notice of proposed rulemaking on April 17, 1979. 44 Fed. Reg. 22960-22972 (1979). Included among the newly proposed regulations were standards for refrigerated trailers and containers as well as property line standards limiting the cumulative noise emitted from a railyard.

However, after reviewing comments received from various sources, the EPA chose a regulatory method different from that embraced in its proposed regulations. Instead, it decided to regulate four major sources of railyard noise and explicitly rejected specific standards for refrigerated cars and trailers:

> *Numerous respondents suggested solutions to the noise problems created by parked refrigerator cars,* among which were the use of disconnects from the diesel generator system and a reconnect to an electrical AC line source, and relocating these cars away from boundary lines adjoining residential and commercial areas when their refrigeration equipment is in operation.
>
> *EPA has decided not to promulgate a source standard for refrigerator cars at this time, in part to allow time to evaluate the effect of their declining use.*

45 Fed. Reg. 1258 (1980) (Emphasis added).

In the Status Report of November 12, 1981, filed by the parties to the *Costle* litigation with the court, the EPA stated that it was withdrawing its proposals for property

line standards because its preferred method of regulating major noise sources is sufficient to regulate noise emissions from rail facilities and thus the property line standards are unnecessary:

> Respondents [EPA] believe that the cumulative effect of these standards [the final standards for specific sources of railroad noise, 45 Fed. Reg. 1252 (1980)], which were based on the noise abatement achievable through application of the best available technology taking into consideration the cost of compliance, effectively regulate both rail equipment and rail facilities. The standards promulgated to date cover the major sources of noise from railroad equipment which in turn generate a large proportion of the noise emissions from rail facilities. *Since the cumulative effect of regulating equipment, used within railyards is also to regulate to a significant degree noise emissions from rail facilities, the parties agree that it is unnecessary for EPA to establish further property line facility emission standards specifically for railyards. In consideration of these facts, EPA intends to withdraw its proposal to promulgate a property line standard for rail facilities.* [EPA] agrees with petitioner, AAR, that EPA has already effectively regulated railroad "equipment and facilities" in a manner "consistent" with the customary usage of the phrase in the railroad industry, 562 F.2d at 1321, and in a manner consistent with the criteria contained in § 17 of the Noise Control Act, and that national uniformity of treatment is effectively assured as the Federal standards become effective.

Status Report, *AAR v. Costle,* No. 76-1353 (D.C. Cir. Nov. 12, 1981) Appellants' Appendix p. A-77 (emphasis added).

On December 1, 1982, the EPA published its decision rejecting property line standards because it deemed them unnecessary:

> The standards promulgated to date cover the major sources of noise from railroad equipment which in turn generate a larger proportion of the noise emissions from rail facilities. Since those standards addressed the major sources of noise from railroad operations, and since the cumulative effect of regulating equipment used within railyards is also to regulate to a significant degree, noise emissions from rail facilities, it was agreed by the AAR, the State of Illinois and the EPA that it is unnecessary for EPA to establish further property line facility emission standards.
>
> *In view of the foregoing, EPA concludes that it has satisfied its statutory requirements, under § 17 of the Noise Control Act of 1972, to promulgate noise standards for railroad equipment and facilities and that the proposed standards are unnecessary.* Accordingly, this notice withdraws the proposed property line and refrigerator car noise emission standards.

47 Fed. Reg. 54106 (1982) (emphasis added).

Delaware, pursuant to the Delaware Act, promulgated regulations on January 20, 1982, without the permission of the EPA, which purport to regulate noise emitted from railyards by setting property line standards—i.e. standards which regulate noise levels at the boundary between the noise generator's property and its neighbor's.

The Appellants attempted to enforce the Delaware Act and its regulations at the Appellees' facility in Wilmington, Delaware by implementing a property line standard. Appellants' chief concern was the noise emitted from refrigerated units at such facilities. Affidavit of Charles Wilkins, III, ¶ 15, Appellants' Appendix p. A-94.

In their Jurisdictional Statement, Appellants attempt to characterize the EPA's withdrawal of these proposed regulations as being motivated by a desire to "buy out of a lawsuit[,]" rather than an interest in fair and effective regulation. AJS p. 12. By tilting at a windmill which is not a party to this case,[1] Appellants raise the spectre of a regulatory agency overcome by the litigative might of the regulated industry. Appellees pause at this rather reckless assertion only to point out that: (1) the EPA reviewed and analyzed comments of several parties other than the AAR before concluding that its proposed regulations were unnecessary, 45 Fed. Reg. 1256 (1980); (2) there is nothing in the record even suggesting that the EPA did not promulgate the proposed regulations as the result of a threat of continued litigation; and (3) there is no logical explanation of why the EPA might have feared review by the *Costle* court of its proposed regulations. After all, the proposed regulations were consistent with the court's command to engage in more, rather than less, regulation and there is nothing in the *Costle* opinion which foreshadows anything other than judicial approval of the proposed regulations.

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ARGUMENT

This case involves nothing more than a difference of opinion between state and federal regulators over the

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[1] The EPA is not a party to this lawsuit. It did, however, file a Memorandum of Law at the request of the Circuit Court which fully confirmed the views of the District Court on the preemption issue. Appellees' Appendix to Motion to Affirm App. 1 ("App. —").

method for controlling railroad noise. Understood as such, the scope of the preemptive blanket given by Congress to the method of regulation chosen by the EPA makes sense and does not pose a rampant threat to "Federalism" or "Republicanism," as the Appellants would have it. Nor does this case involve an issue as to which the courts of the several circuits are in hopeless discord.

I. The Decision Of The Lower Courts Is Correct.

All parties agree that when presented with a claim that a federal statute preempts state or local attempts at regulation, courts must examine the intent of Congress in enacting the federal statute in question. *Brown v. Hotel and Restaurant Employees and Bartenders,* 104 S.Ct. 3179 (1984). Moreover, Appellants concede that Congress intended to give complete preemptive effect to regulations promulgated by the EPA pursuant to the Act. Congress expressly stated that:

> After the effective date of a regulation under this section applicable to noise emissions resulting from the operation of any equipment or facility of a surface carrier engaged in interstate commerce by railroad, no State or political subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is identical to a standard applicable to noise emissions resulting from such operations prescribed by any regulation under this section.

42 U.S.C. § 4916(c)(1). Finally, there is an undisputed record that, in the EPA's view, the EPA has regulated

noise emissions from all railroad equipment and facilities as directed by the *Costle* court.[2]

However, the Appellants part company with Appellees, the EPA and the lower courts by asserting that the EPA's selection of a regulatory method—i.e. its decision to regulate railroad facilities by imposing standards for major noise producing elements within such facilities rather than imposing property line standards like Delaware's —leaves the State with authority to adopt any regulatory method not adopted by the EPA, including those methods which were considered and rejected.

Such a proposition renders the preemptive provisions of the Act meaningless and seriously frustrates the stated Congressional objective of nationally uniform regulation. 42 U.S.C. § 4901(a)(3). In avoiding such a result, the lower courts were guided by a well-settled principle previously articulated by the Court:

> [A] federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much preemptive force as a decision to regulate.

Arkansas Elec. Co-op. v. Arkansas Public Service Commission, 461 U.S. 375 (1983); *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 178 (1977).

In this case the lower courts simply recognized the preemptive effect of an authoritative decision by the responsible federal agency that a certain method of regula-

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[2] As the EPA confirmed in its brief, "under the literal language of section 17(c)(1) [42 U.S.C. § 4916(c)(1)] it appears that any state regulation of railroad facilities, including Delaware's property-line standard, is preempted." App. 9 (footnote omitted).

tion was unnecessary inasmuch as existing federal standards effectively regulated noise emissions from railroad equipment and facilities. Thus, while the Appellants apparently quarrel with the EPA over the adequacy of the chosen regulatory method, Appellants do not have a sound basis for challenging the lower courts' decision to recognize Congress' intent to preempt state regulation.

II. The Decision Of The Lower Courts Pose No "Threat To Federalism."

Appellants suggest that the lower courts have indiscriminately given preemptive effect to a federal determination not to regulate and that, absent corrective guidance by this Court, state regulators will be "stymied in their efforts to address a problem of state interest." AJS p. 12.

Appellants' sense of alarm over this "threat to federalism" is particularly unwarranted in this case. Although Congress' primary objective in passing the Act was to protect citizens from excessive noise through a nationally uniform set of regulations, it was nevertheless solicitous of individual state's enforcement concerns. The Act provides:

> Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards or controls on the levels of environmental noise, or to control, license, regulate or restrict the use, operation or movement of any product if the Administrator, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation, or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under this section.

42 U.S.C. § 4916(c)(2).

This open invitation for states which judge the federal standards to be inadequate in light of special local

conditions to craft, as part of a cooperative federal/state effort, supplementary regulation which exemplifies, rather than threatens, federalism. As noted by the District Court, Delaware has never taken up this Congressional invitation, *B&O Railroad v. Oberly,* 606 F.Supp. 1340, 1348 n. 6 (D.Del. 1985), and the Appellants have never explained her failure to do so. Delaware has not been "stymied" in her efforts to protect her citizens against excessive noice from the Appellees' railroad facility, except, perhaps, by her own failure to seek relief plainly offered to it under the Act.

Appellants also misunderstand or ignore the clear Congressional intent behind the Act in asserting, as a general proposition, that before the preemptive effect of a federal decision to forego regulation can be judicially recognized, the court must identify "an agency's affirmative determination that state regulation is not in the public interest." AJS p.11. Appellants forget that it is Congress' intent, not the EPA's, that matters.[3] In fact, the court in *AAR v. Costle* chided the EPA for presuming that it had the authority to ignore a clear congressional command. 562 F.2d at 1311.

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[3] Appellants cite *Capital Cities Cable, Inc. v. Crisp,* 104 S.Ct. 2694 (1984) as "requiring" evidence of an affirmative determination by the agency that the state regulation would be contrary to public interest. That may be true, where, as in *Capital Cities,* the federal scheme left to the relevant agency the authority to determine the scope of federal preemption. In this case, however, the Act makes clear that Congress, and not the EPA, made the determination to preempt state and local regulation. Appellants reliance on *NLRB v. Nash-Finch Co.,* 404 U.S. 138 (1971) is similarly misplaced and any difference between that case and the case at bar can be attributed to the particular federal acts in question.

III. There Is No "Discord" Among The Lower Federal Courts Over The Application Of Preemptive Principles.

The Appellants' Jurisdictional Statement reveals two things. First, Appellants clearly understand the need to demonstrate, in order to gain plenary review, that this case involves important questions of federal law as to which the lower federal courts are in disagreement. Second, Appellants are unable to identify such "discord" among the lower federal courts.

As best we understand the argument, Appellants claim that some federal courts blindly provide preemptive protection to federal decisions to forego regulations—the "per se" application—while others employ a "case-specific analysis" to claims of preemption. AJS pp. 11-14. The cases upon which Appellants rely, including the instant case, display no such judicial schizophrenia. Instead, they demonstrate that federal courts consistently look to the fundamental criterion of Congressional intent in determining whether state regulation has been preempted.

For example, in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983), the 9th Circuit Court of Appeals compared the Federal Railroad Safety Act of 1970, 45 U.S.C. § 434 (1976), with the Boiler Inspection Act of 1911, 45 U.S.C. § 23 (1976), and concluded, with respect to the former, that Congress had intended no preemption in the absence of a federal action concerning the same subject matter as was affected by competing State regulation. With respect to the latter, the Court concluded that Congress had intended to displace all state regulation regardless of whether federal regulatory authority had actually been exercised. *Id.* at 1152-53. The *Marshall* court applied no "per se" test. Indeed, the case stands

as testimony that at least the 9th Circuit Court of Appeals well understands that there is, and can be, no "per se" application of the principle articulated in *Arkansas Elec. Co-Op Corp. v. Arkansas Public Service Commission,* and *Ray v. Atlantic Richfield*—i.e., that a considered federal agency decision not to exercise federal regulatory authority may, *in some cases,* be equally as preemptive as a decision to exercise such regulatory authority.

None of the other cases cited by Appellants suggest there exists any misunderstanding of appropriate preemption analysis among the lower courts. A reading of these cases indicates only one thing in this regard—federal courts understand that, depending upon their interpretation of Congress' intentions, State or local attempts at regulation *may* or *may not* be preempted.

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CONCLUSION

The lower courts properly determined that the EPA's carefully considered judgment not to impose property line standards or standards specifically for refrigeration units is precisely the exercise of federal regulatory authority under the Act that Congress intended to protect by raising a preemptive shield. Because the lower ocurts applied well settled legal principles in this case, there is

no reason for the Court to receive further briefing or argument and the case should be summarily affirmed.

Respectfully submitted,

DUANE, MORRIS & HECKSCHER

BY /s/ WILLIAM E. MANNING
ALICE W. BECK

1220 Market Building
Suite 7000
Wilmington, DE 19899

Counsel for Appellees

DATED: May 28, 1986

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
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Appellants.

No. 85-5272

MEMORANDUM OF LAW OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

F. HENRY HABICHT II
Assistant Attorney General
Land and Natural Resources Division

LAWRENCE R. LIEBESMAN, Attorney
Environmental Defense Section
Land and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 633-2281

OF COUNSEL:

FRANCIS S. BLAKE
General Counsel
U.S. Environmental Protective Agency
Washington, D.C. 20460

PETER H. WYCOFF
Acting Asosciate General Counsel
Air and Radiation Division
U.S. Environmental Protection Agency
Washington, D.C. 20460

GERALD GLEASON
Assistant General Counsel
Office of General Counsel (LE-132A)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

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No. 85-5272

MEMORANDUM OF LAW OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

(p. 1) Introduction

On October 18, 1985, the Court requested the views of the Environmental Protection Agency on the issue of whether the Delaware noise regulation at issue, purporting to establish a "property-line standard" applicable to railroad activities at the Wilshire, Delaware facility, has been preempted by the Noise Control Act (NCA) 42 U.S.C. § 4901. The specific preemption issue before the Court is whether the district court was correct in holding that section 17 of the Noise Control Act preempts the Delaware standard where EPA has adopted federal standards regulating noise from such facilities and, further has considered and then declined to prescribe a federal property-line standard for such facilities on the ground that it is unnecessary.[1]

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[1] Section 17 reads in relevant part:

(c) State and local standards and controls

(1) Subject to paragraph (2) but notwithstanding any other provision of this chapter, after the effective date of a regulation under this section applicable to noise emissions, resulting from the operation of any equipment or facility of a surface carrier engaged in inter-

(Continued on following page)

(p. 2) For the reasons set forth herein, the Delaware standard appears to be preempted.

I

IN ENACTING THE NOISE CONTROL ACT, CONGRESS EXPRESSLY PREEMPTED STATE REGULATION OF NOISE FROM RAILROAD EQUIPMENT AND FACILITIES REGULATED BY EPA

The Supreme Court's test for preemption has been articulated in a number of recent opinions. Essentially, the Court has identified two situations in which federal law totally (p. 3) or partially preempts state law. First, "if Congress expressly indicates an intent to occupy a given field, any state law falling within that field is preempted." *Silkwood v. Kerr-McGee Corp.* 104 S. Ct. 615 (1984). Second, "if Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it actually conflicts with

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(Continued from previous page)

state commerce by railroad, no State or political subdivision thereof may adopt or enforce any standard applicable to noise emissions resulting from the operation of the same equipment or facility of such carrier unless such standard is identical to a standard applicable to noise emissions resulting from such operation prescribed by any regulation under this section.

(2) Nothing in this section shall diminish or enhance the rights of any State or political subdivision thereof to establish and enforce standards, or controls on levels of environmental noise, or to control, license, regulate, or restrict the use, operation, or movement of any product if the Administrator, after consultation with the Secretary of Transportation, determines that such standard, control, license, regulation, or restriction is necessitated by special local conditions and is not in conflict with regulations promulgated under this section.

federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Id; See also Fidelity Savings & Loan Association* v. *de la Cuesta,* 458 U.S. 141, 153 (1982), *Michigan Canners and Freezers Assoc.* v. *Agricultural Marketing and Bargaining Bd.,* 104 S. Ct. 2518 (1984), *Hillsborough County, Fla.* v. *Automated Medical Laboratories, Inc.,* 53 U.S.L.W. 4612 (June 3, 1985).

Under either test, section 17 of the NCA clearly preempts state regulation of noise from railroad equipment or facilities that EPA has regulated.[2] When Congress enacted the Noise Control Act in 1972, it set up a comprehensive regulatory scheme for major sources of noise emissions that expressly preempts state and local regulation to varying degrees in a variety of areas.[3] Central to this regulatory scheme was a declaration that federal action is (p. 4) essential to assure "national uniformity of treatment" for certain sources of noise, 42 U.S.C. 4901(a). Aside from the express preemption language of section 17, the legislative history of the Act clearly reflects Congress' concern that there be "maximum prac-

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2 States may, however, adopt and enforce standards identical to EPA standards. Section 17(c)(1).

3 See sections 6(c), 17(c), 18(c). For railroads, Congress provided an "escape" from total preemption if the EPA Administrator after consulting with the Secretary of Transportation determines that state and local regulation is "necessitated by special local conditions" and will not be in conflict with EPA's regulatory actions. Section 17(c)(2).

tical uniformity'' in noise regulation for interstate carriers such as railroads and motor carriers.[4]

(p. 5) The principal case addressing the issue of preemption under the NCA is the D.C. Circuit's decision in *Association of American Railroads (''AAR'') v. Costle*, 562 F.2d 1310 (D.C. Cir. 1977). *AAR* relied on Congress'

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[4] Debate on the Senate Committee Report for the NCA bears this out. Two excerpts illustrate this concern:

Senator Randolph:

> "I also bring to the attention of the Senate the the provisions in title V of S. 3342, which establishes a regulatory framework for noise from interstate trucks and buses and the operations of railroads. Here, as well as in the area of product noise emission standards, the transportation industry is faced with the prospect of conflicting noise control regulations in every jurisdiction along their routes. It is completely inappropriate for interstate carriers or interstate transportation to be burdened in this way.

118 Cong. Rec. 35412 (1972) (remarks of Senator Randolph).

Senator Hartke:

> "Mr. HARTKE. Mr. President, one of the basic purposes of title V of this bill, as explained in the committee report, is to assure the maximum practical uniformity in regulating the noise characteristics of interstate carriers such as the railroads and motor carriers which operate from coast to coast and through all the States, and in hundreds of communities and localities.
>
> "Without some degree of uniformity, provided by Federal regulations of countrywide applicability which will by statute preempt and supersede any different State and local regulations or standards, there would be great confusion and chaos. Carriers, if there were not Federal preemption, would be subject to a great variety of differing and perhaps inconsistent standards and requirements from place to place. This would be excessively burdensome and would not be in the public interest."

118 Cong. Rec. 35881 (1972) (remarks of Senator Hartke).

intent to assure national uniformity of treatment for the railroad industry in overturning EPA's decision only to regulate locomotives and rail cars. Here, the district court relied on *AAR*, stating that:

> *Costle* concluded that the plain language of Section 17 of the Act did not permit the interpretation that Congress intended to vest discretion in the EPA to decide *which of the* equipment and facilities would be subject to regulation. *Id.* at 1315 (emphasis supplied by court). The court found that the reference to "equipment and facilities" was unambiguous and "subsumes *all* such equipment and facilities." *Id.*

Slip op. at 6.

The court below here then addressed the key issue of whether preemption extended to the present situation where EPA, following remand in *AAR*, expressly considered and then declined to issue a property-line standard for railroad facilities because it found that the "cumulative effect" of other railroad standards was to regulate railroad equipment and that the additional property-line standard was unnecessary in order to achieve "national (p. 6) uniformity of treatment." 47 Fed. Reg. 54107-54108 (1982). Thus, the court below concluded that EPA's decision to withdraw its proposed property-line standard for railroad facilities due to the adequacy of existing standards did not create a "regulatory gap" allowing Delaware to regulate such facilities. While the Agency's Federal Register notice withdrawing the proposed property-line standard did not unambiguously address the preemptive effect issue under section 17, EPA believes that the district court's ruling on preemption here was correct for two reasons.

First, when EPA considered and then declined to issue a property-line standard, it concluded that its prior standards for railroad equipment effectively regulated noise from railroad facilities as well.[5] Thus, under the literal language of section 17(c)(1), it appears that any state regulation of railroad facilities, including Delaware's property-line standard, is preempted.[6]

Second, in withdrawing its proposed property-line standard, EPA concluded that, in view of its prior standards, further standards for sources of railroad noise were unnecessary.[7] (p. 7) "[A] federal decision to forego regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate." *Arkansas Elec. Co-op Corp. v. Arkansas Public Commission*, 103 S. Ct. 1905, 1912 (1983); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1977). Thus, Delaware's attempt to regulate railroad facilities by means of a property-line standard, after EPA had ex-

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5 47 Fed. Reg. at 54108.

6 In addition, the fact that Congress carved out an express "escape" procedure under § 17(c)(2) whereby states and localities may specifically petition EPA and DOT to allow them to regulate certain sources of railroad noise as justified under "special local conditions" further supports the view that § 17(c)(1) was intended to have a broad preemptive effect. This is so because Congress felt that preemption could only be defeated if the (c)(2) procedure was invoked and a specific determination was made by EPA in consultation with DOT.

7 *Id.* Delaware had an adequate remedy to challenge EPA's decision not to regulate railroad facilities. It could have filed a petition to review EPA's decision to withdraw the proposed standard under section 16(a) of the NCA. 42 U.S.C. 4916(a).

pressly considered and declined to do so, would appear to be preempted under this line of analysis as well.[8]

II

THE QUIET COMMUNITIES ACT OF 1978 DID NOT LESSEN THE BROAD PREEMPTIVE EFFECT OF SECTION 17 OF THE NOISE CONTROL ACT

Delaware contends on appeal that the Quiet Communities Act of 1978, P.L. 95-609, cut back the preemptive effect of the NCA and implicitly authorized state and local noise regulation. This is incorrect. If anything, the Quiet Communities Act reiterated the broad preemptive effect of the NCA.

Essentially, the Quiet Communities Act encourages federal/state cooperation in noise abatement efforts and provides limited funding to states in order to supplement their resources (p. 8) in that regard. See. R. No. 95-1171, 95th Cong. 2d Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 7569, 7570. Congress took care, however, not to erode the provisions of the Act:

> No actions, plans, or programs hereunder shall be inconsistent with the existing Federal authority under [the Noise Control Act] to regulate sources of noise in interstate commerce.

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[8] EPA's decision did not expressly address whether other sources of railroad noise were "best left unregulated." Its conclusion was that it had satisfied its own statutory duty to issue standards for railroad equipment and facilities, and that further federal standards were unnecessary. 47 Fed. Reg. at 54108. Conceivably state standards for railroad equipment that EPA has neither regulated nor considered regulating might not be preempted. That question, however, is not presented in this case.

42 U.S.C. § 4913(c)(1) (subsection (c)(1) of the Quiet Communities Act).

The only case to date construing the Quiet Communities Act is *San Diego Unified Port District v. Gianturco,* 651 F.2d 1306, 1313 (9th Cir. 1981), *cert. denied,* 455 U.S. 1000, which was decided against the background of the Supreme Court's 1973 ruling in *City of Burbank v. Lockheed Air Terminal, Inc.,* 411 U.S. 624 (1973), which defined the scope of federal preemption under the Noise Control Act for aviation noise sources. In *Gianturco,* the California Transportation Agency (CALTRANS) relied on the QCA in attempting to impose an airport curfew, distinguishing such regulation from federal regulation of aircraft noise sources. CALTRANS agrued that the nationwide quiet communities program under the QCA indicated a congressional intent "to reject total federal control of the source of aircraft noise and to involve local governments in the national effort to abate such noise" 651 F.2d at 1312. The *Gianturco* court rejected CALTRANS position. The court read subsection (c)(1) of the Quiet Communities Act as Congressional reaffirmation of the judicially interpreted scope of preemption under the Noise Control Act, holding that "Congress intended to continue such preemption." *Id.* at 1313.

(p. 9) In short, EPA believes the Quiet Communities did not narrow the preemptive effect of Setcion 17 of the NCA.

Conclusion

For the reasons set forth above, the Delaware property-line standard appears to be preempted by section 17 of the Noise Control Act.

Respectfully submitted,

F. HENRY HABICHT II
Assistant Attorney General
Land and Natural Resources Division

/s/ LAWRENCE R. LIEBESMAN, Attorney
Environmental Defense Section
Land and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 633-2281

OF COUNSEL:

FRANCIS S. BLAKE
General Counsel
U.S. Environmental Protection Agency
Washington, D.C. 20460

PETER H. WYCKOFF
Acting Associate General Counsel
Air and Radiation Division
U.S. Environmental Protection Agency
Washington, D.C. 20460

GERALD GLEASON
Assistant General Counsel
Office of General Counsel (LE-132A)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460